UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG DIVISION

JOHN KNOTT

Plaintiff,

Case No.: 3:1-cv-82-JPB

v.

HSBC CARD SERVICES INC.

Defendant

DEFENDANT HSBC CARD SERVICES INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR REMAND

I. INTRODUCTION

This Court has jurisdiction over this case, pursuant to 28 U.S.C. § 1452, because the substance of Plaintiff's Complaint alleges that HSBC Card Services Inc. ("Card Services") violated the bankruptcy discharge injunction, which allegations raise a question of federal law. 28 U.S.C. § 1334 (providing the district court has "original and exclusive jurisdiction of all cases under title 11" and original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11). Although Plaintiff's Complaint asserts two state-law causes of action, these claims are completely preempted by the Federal Bankruptcy Code. Thus, this Court must scrutinize Plaintiff's Complaint and determine that this lawsuit is actually grounded in federal law. In fact, Plaintiff concedes that the alleged conduct that forms the basis of his Complaint also forms the basis for a cause of action for a violation of the discharge injunction. Because Plaintiff's Complaint asserts a question of federal law, this Court has jurisdiction over this case, pursuant to 28 U.S.C. §§ 1334 and 1452, and Plaintiff's Motion for Remand should be denied.

II. FACTS AND PROCEDURAL HISTORY

According to Plaintiff's Complaint, Plaintiff obtained a credit card from Card Services, apparently sometime before October 2009. (Complaint, ¶ 3.) Thereafter, in October 2009, Plaintiff filed a petition for bankruptcy in the Bankruptcy Court for the Northern District of West Virginia, which was assigned Case Number 3:0-bk-02500. (*Id.*, ¶ 4, Exhibit "B.") The following month, Card Services allegedly received notice of the bankruptcy filing, which notice included Plaintiff's attorney's name and contact information. (*Id.*, ¶ 5, Exhibit "B.") Plaintiff received a discharge from bankruptcy in February 2010. (*Id.*, ¶ 6, Exhibit "C.") Despite the discharge, Plaintiff alleges Card Services continued to contact him in an attempt to collect the debt. (*Id.*, ¶ 7.)

Plaintiff filed this lawsuit in the Circuit Court of Jefferson County, West Virginia, on July 8, 2010. The Complaint alleges that Card Services violated W. VA. CODE § 46A-2-128(e) by illegally attempting to collect the debt and that these actions also constituted negligence *per se*. (Complaint, ¶¶ 17-22.) Plaintiff seeks actual damages; the maximum civil penalty for each violation under W. VA. CODE §§ 46A-5-101 and 46A-5-106; attorney fees and costs under W. VA. CODE § 46A-5-104; pre- and post-judgment interest; and an injunction against Card Services to prevent it from continuing to attempt to collect the debt. (Complaint, WHEREFORE clause, p. 4.)

Card Services received Plaintiff's Complaint and Summons on July 14, 2010. On August 12, 2010, Card Services filed a timely Notice of Removal, removing this case from the Circuit Court of Jefferson County to this Court. Then on August 19, 2010, Plaintiff filed a Motion for Remand, Memorandum in Support of Motion to Remand Case, and Stipulation of Amount in Controversy. (*Docket Nos.* 7, 7-1, 7-3, 8.)

III. LEGAL STANDARD

Federal district courts are courts of limited jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). They can generally only exercise subject matter jurisdiction over a case in two situations: (i) if the matter raises a federal question, 28 U.S.C. § 1331, or (ii) if the parties are completely diverse and the amount in controversy exceeds $75,000, 28 U.S.C. § 1332. *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006). A case involves a federal question if it arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. The party seeking to invoke federal court jurisdiction has the burden of proving jurisdiction is appropriate. *Maryland Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 260 (4th Cir. 2005).

"A party may remove any claim or cause of action in a civil action . . . if such district court has jurisdiction of such claim or cause of action under § 1334 of [Title 28]." 28 U.S.C. § 1452. The district court has "original and exclusive jurisdiction of all cases under title 11" and original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11. 28 U.S.C. § 1334. An allegation that a creditor attempted to collect a debt post-discharge is a claim for a violation of the discharge injunction under the Federal Bankruptcy Code. 11 U.S.C. § 524. The sole remedy for an alleged violation of the discharge injunction is to bring a contempt proceeding in the bankruptcy case. *Frye v. Bank of America, N.A.*, No. 3:10-CV-47, 2010 WL 3244879, at *20 (N.D.W. Va. August 16, 2010); *Johnston v. Telecheck Servs. (In re Johnston)*, 362 B.R. 730, 741 (Bankr. N.D.W. Va. 2007).

In determining if a federal question is present, the Court is not bound by the Complaint's language; it must look to the substance of the pleading, not the labels used by Plaintiff. *Davis v. Rutherford*, Slip Op. No. 2:09-cv-00096, 2009 WL 2599329, at *4 (S.D.W. Va. May 19 2009) (quoting *McCastle v. Rollins Envtl. Servs.*, 514 F. Supp. 936, 938 (M.D. La. 1981)). Plaintiff cannot avoid federal jurisdiction by omitting from his Complaint a federal law that is essential to his claim or by casting in state law terms a claim that can be made only under federal law. *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 344 (9th Cir. 1996). "The general rule that a plaintiff basing his claim solely on the state law thereby avoids removal applies only where state substantive law has not been pre-empted by federal law." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 408 (1981). In a case where Congress has stated that Plaintiff's exclusive remedy arises from federal law, "it would be unacceptable to permit that very plaintiff, by the artful manipulation of the terms of his complaint, to defeat a clearly enunciated congressional objective." *Id.* "The federal court must therefore scrutinize the complaint in the removed case to determine whether the action, though ostensibly grounded solely on state law, is actually grounded on a claim in which federal law is the exclusive authority." *Id.*

IV. ARGUMENT

Plaintiff filed a Stipulation of Amount in Controversy (*Docket No. 8*), asserting diversity jurisdiction does not exist in this matter. This Court, however, enjoys subject matter jurisdiction over this lawsuit under 28 U.S.C. § 1331 because Plaintiff's Complaint actually alleges a violation of the discharge injunction, which is a question of Federal Bankruptcy Law. *Federated Dept. Stores*, 452 U.S. at 408. Although Plaintiff's Complaint is labeled as including only state law claims, these state law claims are preempted by the Federal Bankruptcy Code because (i) Congress intended to occupy the entire field with regard to discharge injunction violations and (ii) the state law claims improperly create a cause of action that does not exist under federal law. Since Congress completely preempted the field and provided for a remedy with regard to alleged violations of the discharge injunction, for the purposes of removal, Plaintiff's state law claims must be read as asserting a question of federal law. *Federated Dept. Stores,* 452 U.S. at 408.

A. This Court has Subject Matter Jurisdiction Over This Lawsuit Because Plaintiffs' State Law Claims Are Preempted by the Federal Bankruptcy Code.

Because the Bankruptcy Code was created under the Article I, Section 8 of the United States Constitution, it is "the supreme Law of the Land, . . . Any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, when a state enacts a statute that affects a party's rights or duties in a bankruptcy proceeding, the Court must determine whether the state law is a bankruptcy law that is expressly preempted by the Federal Bankruptcy Code or whether the state statute is not a bankruptcy law, but has an impermissible application as it relates to the Federal Bankruptcy Code. *See, e.g., Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 526 (1933); *International Shoe v. Pinkus*, 278 U.S. 261, 265 (1929).

The Court analyzes four standards in determining whether a state law that is not a bankruptcy law is preempted by the Federal Bankruptcy Code: (1) whether the state law is expressly preempted; (2) whether Congress intended to occupy the entire field; (3) whether the state law conflicts with the federal statute such that the state law cannot be given effect; and (4) whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Johnston v. Telecheck Servs., Inc.*, 362 B.R. 730, 735 (Bankr. N.D.W. Va. 2007) (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) ("[T]he categories of preemption are not 'rigidly distinct' . . . [T]he entire scheme of the statute must of course be considered . . . ."); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) ("Our primary function is to determine whether, under the circumstances of this particular case, [a state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.")).

The state statute that Plaintiff alleges Card Services violated prohibits a debt collector from utilizing unfair or unconscionable means to collect a debt, and provides specific examples of conduct that is deemed to violate the section. W. VA. CODE § 46A-2-128. The statute provides, in part:

> No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:
>
> * * *
>
> (e) Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

Id. This section does was created to give consumers a state law cause of action where one did not previously exist in the event a creditor utilizes unfair and unconscionable means to collect a debt. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 523 (W. Va. 1995).

1. **Plaintiff's State Law Claims Are Preempted Because Congress Provided the Exclusive Remedy for a Violation of the Discharge Injunction in 11 U.S.C. § 524.**

"[S]everal courts have determined that state law causes of action that would allow a debtor to collect damages for a violation of the discharge injunction are foreclosed by the remedies provided by § 524 of the Bankruptcy Code." *Johnston*, 362 B.R. at 737 (listing cases).

Indeed, as this Court has previously explained, the remedy provided for by § 524 is the exclusive remedy for a violation of the discharge injunction. *Johnston*, 362 B.R. 737; *Cox v. Zale Del., Inc.*, 239 F.3d 910, 915 (7th Cir. 2001).

In *Frye v. Bank of America, N.A.*, No. 3:10-CV-47, 2010 WL 3244879 (N.D.W. Va. August 16, 2010), a debtor whose debt had been discharged in bankruptcy brought a four-count Complaint that alleged the creditor violated various state laws and § 524 for continuing to attempt to collect her discharged debt. The debtor alleged the creditor violated W. VA. CODE § 46A-2-128(e) and W. VA. CODE § 46A-2-128(d), which provides that the collection or attempted collection of unauthorized charges, fees, or expenses is an unfair or unconscionable debt collection practice. The Court held that the debtor's claims under W. VA. CODE § 46A-2-128(d) (which prohibits unfair or unconscionable debt collection practices like W. VA. CODE § 46A-2-128(e)) were preempted by the Federal Bankruptcy Code.[1] *Id.*, at *15. The Court was not persuaded by the debtor's argument that these claims were based upon violations of the contract, stating **"[n]o matter the form of WVCCPA violation alleged**, the dispositive factor is that the plaintiffs rely upon violations of the discharge injunction to support their claims . . . ." *Id.*, at *16. In dismissing the state law claims, the Court held: "As explained in *Johnston*, allowing such claims to proceed would directly contravene 'Congressional exclusivity in the field of bankruptcies.'" *Id.*

Congress provided the exclusive remedy for a violation of the discharge injunction, thus W. VA. CODE § 46A-2-128(e), which prohibits unfair and unconscionable debt collection, is preempted by the Federal Bankruptcy Code. The purpose of W. VA. CODE § 46A-2-128 is to prevent creditors from utilizing unfair or unconscionable means to collect a debt. W. VA. CODE § 46A-2-128. Even though the statute provides specific examples of unfair or unconscionable conduct in order to assist creditors with compliance, the purpose of the statute (and its individual subsections) is to protect consumers from harmful debt collection practices. *Id.* But with regard

[1] This Court also held that the debtor's claims under W. VA. CODE § 46A-2-128(e) were preempted by the National Bank Act and a Code of Federal Regulation. *Id.*, at *13.

to a claim for a violation of the discharge injunction in bankruptcy, Congress intended to occupy the entire field through its enactment of 11 U.S.C. § 524. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-11 (9th Cir. 2002) (stating that the Bankruptcy Code provides the sole remedy for a violation of the discharge injunction and "[t]o permit a simultaneous claim under the FDCPA would allow through the back door what [the creditor] cannot accomplish through the front door—a private right of action."); *Bassett v. Am. Gen. Fin., Inc. (In re Bassett)*, 255 B.R. 747, 754 (9th Cir. BAP 2000) (aff'd in part, rev'd in part on other grounds by *In re Bassett*, 285 F.3d 882).

Plaintiff incorrectly argues that W. VA. CODE § 46A-2-128(e) is not preempted by federal bankruptcy law, relying on *Johnston v. Valley Credit Servs. (In re Johnston)*, 2007 Bankr. LEXIS 1174 (Bankr. N.D.W. Va. Apr. 12, 2007) for support. But the *One Valley* Court[2] held that it did not have jurisdiction to decide any of the issues presented to it, thus its statements on the issue merely constitute dicta and, moreover, the cases it relied upon are significantly distinguishable. *Id.*, at *2 ("For the reasons stated herein, the court finds that the Debtor's claim under W. Va. Code § 46A-2-128(e) is not preempted by the Bankruptcy Code, but that **the court is without subject matter jurisdiction to adjudicate the dispute.**") (emphasis added).

In deciding that W. VA. CODE § 46A-2-128(e) is not preempted by the Bankruptcy Code, the *One Valley* Court relied upon *Sears, Roebuck & Co. v. O'Brien*, 178 F.3d 962, 966-67 (8th Cir. 1999); *Sturm v. Providian Nat'l Bank*, 242 B.R. 599, 602 (S.D.W. Va. 1999); and *Alexander v. Unlimited Progress Corp.*, No. 02-C-2063, 2003 U.S. Dist. LEXIS 5560 (N.D. Ill. March 24, 2003). The rulings in these three cases are the minority rule. *See, e.g., Wehrheim v. Secrest, P.C.*, No. IP 00-1328-C-T/K, 2002 WL 31242783, at *6 (S.D. Ind. Aug 16, 2002) ("The courts are divided on this issue, but the majority have held that such FDCPA claims are precluded [by the Bankruptcy Code].")

---

[2] Card Services will refer to this case as *One Valley* to avoid confusion with *Johnston v. Telecheck Servs., Inc.*, 362 B.R. 760 (Bankr. N.D.W. Va. 2007).

Further, each of the three cases *One Valley* relied upon is distinguishable from this case. *Alexander* did not discuss state law preemption, but instead dealt with whether claims under the FDCPA were **precluded** by the Bankruptcy Code. *Alexander*, 2003 U.S. Dist. LEXIS 5560. Because one federal law cannot preempt another federal law, this preclusion issue was an entirely different analysis than state law preemption. *Id.* In both *Sturm* and *Sears, Roebuck & Co.*, the borrowers alleged violations of the automatic stay, not the discharge injunction. *Sturm*, 242 B.R. at 601; *Sears, Roebuck & Co.*, 178 F.3d at 966-67. Thus, the preemption analysis was different in those cases than in this case, where the discharge injunction and not the automatic stay is at issue.

Further, to the extent that *Sears, Roebuck & Co.* decided that the state law was not preempted by the Bankruptcy Code because Congress has not regulated the relationship between private lawyers and their clients, that reasoning is not applicable here. The state law at issue here—W. VA. CODE § 46A-2-128(e)—regulates debt collection, not the relationship between attorneys and their clients. The purpose of W. VA. CODE § 46A-2-128(e) is to give debtors a cause of action where one was difficult to maintain under the common law. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 523 (W. Va. 1995). Allowing a debtor to maintain a state law cause of action under W. VA. CODE § 46A-2-128(e) due to an alleged violation of a discharge injunction would impermissibly permit the debtor to directly contravene "Congressional authority in the field of bankruptcies." *Frye*, 2010 WL 3244879, at *16. Indeed, Plaintiff even admits he could have asserted a claim for a violation of the discharge injunction, but instead purposely brought only state law claims. (Memorandum of Law in

Support of Motion to Remand Case (*Docket No. 7-1*), p. 5, n.1.) Such end-runs around the Bankruptcy Code are not permitted. *Frye*, 2010 WL 3244879, at *16. Thus, W. VA. CODE § 46A-2-128(e) is preempted by the Federal Bankruptcy Code.

2. W. Va. Code § 46A-2-128(e) Is Preempted Because it Impermissibly Creates a Cause of Action That Does Not Exist Under Federal Law.

One of the four standards a Court analyzes in determining whether a non-bankruptcy state law is preempted by the Federal Bankruptcy Code is whether the state law attempts to affect the rights and remedies provided under federal law. *Johnston v. Telecheck Servs., Inc.*, 362 B.R. at 735; *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In this case W. VA. CODE § 46A-2-128(e) impermissibly creates a remedy that does not exist under federal law. 11 U.S.C. § 524 does not provide a private cause of action for a violation of the discharge injunction. *Frye*, 2010 WL 3244879, at *20; *Johnston v. Telecheck Servs. (In re Johnston)*, 362 B.R. 730, 741 (Bankr. N.D.W. Va. 2007). Even though no private cause of action exists under federal law for a violation of the discharge injunction, Plaintiff has impermissibly asserted state law causes of action, seeking damages for an alleged violation of the discharge injunction. (Plaintiff's Complaint, ¶¶ 1-22.) By doing so, not only has Plaintiff pled around the Federal Bankruptcy Code, but he has attempted to create a cause of action where one does not exist. Indeed, Plaintiff **concedes** this was his intent. (Memorandum of Law in Support of Motion to Remand Case (*Docket No. 7-1*), p. 5, n.1.) Because Plaintiff's state law claims would affect the rights and remedies available under the Federal Bankruptcy Code by creating a cause of action that does not exist, Plaintiff's state law claims are preempted by the Federal Bankruptcy Code. *Johnston*, 362 B.R. at 735; *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

B. Because Plaintiff's State Law Claims Are Preempted By the Federal Bankruptcy Code, Plaintiff's Complaint Asserts a Federal Question, Entitling Defendants to Removal.

Plaintiff may not plead his way out of federal court by purposely omitting from his Complaint essential federal law or by casting a claim that can be made only under federal law in state law terms. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 408 (1981). This Court must scrutinize Plaintiff's complaint and determine that the lawsuit, in which Plaintiff only asserted state law claims, is actually grounded on a claim in which federal law is the exclusive authority. *Id.*

Regardless of the labels Plaintiff applied to the claims in his Complaint, there is no question that Plaintiff seeks damages for Card Services' alleged violation of the discharge injunction. (Complaint, ¶ 7 ("The Defendant HSBC continued contacting the Plaintiff in an attempt to collect the subject debt"); ¶¶ 9-13 ("That the Defendant HSBC contacted the Plaintiff . . . **in an attempt to collect on a discharged debt**" (emphasis added)); ¶ 15 ("That the Defendant employed unfair and unconscionable means in an attempt to collect the debt **in that it continued to collect a debt that it knew was not legally enforceable.**" (emphasis added)).) Indeed, Plaintiff admitted that the factual circumstances upon which the Complaint is based allege a violation of the discharge injunction. (Memorandum of Law in Support of Motion to Remand Case (*Docket No. 7-1*), p. 5, n.1.)

Plaintiff's Complaint is nothing more than an improper, artful attempt to avoid Federal Bankruptcy Law and keep his lawsuit in state court. *Federated Dept. Stores*, 452 U.S. at 408. But as this very Court has held, the proper procedure for asserting an alleged violation of the discharge injunction is to bring a contempt proceeding in the bankruptcy case under 11 U.S.C. § 524. *Frye v. Bank of America, N.A.*, No. 3:10-cv-47, 2010 WL 3244879, at *15-16 (N.D.W. Va. Aug. 16, 2010) (citing *In re Johnston*, 362 B.R. 730, 741 (Bankr. N.D.W. Va. 2007); *Cox v. Zale*

Delaware, Inc., 239 F.3d 910, 917 (7th Cir. 2001)). As explained above, Plaintiff's state law claims are completely preempted by the Federal Bankruptcy Code. Thus, this Court must look beyond the labels contained in Plaintiff's Complaint and determine that Plaintiff has actually asserted a cause of action under the Federal Bankruptcy Code. Since Plaintiff has raised a question of federal law, this Court has subject matter jurisdiction over Plaintiff's Complaint pursuant to 28 U.S.C. §§ 1334 and 1452. Plaintiff's Motion to Remand should be denied.

CONCLUSION

This Court has subject matter jurisdiction over Plaintiff's Complaint because the substance of Plaintiff's Complaint alleges a federal question under 11 U.S.C. § 524. Although Plaintiff's Complaint contains only state law claims, these claims are completely preempted by the Federal Bankruptcy Code. Congress provided the exclusive remedy for a violation of the bankruptcy discharge injunction under 11 U.S.C. § 524 and the state law affects Plaintiff's rights under Bankruptcy Law by impermissibly creating a cause of action that does not exist under federal law. Plaintiff concedes that he could have brought a claim under 11 U.S.C. § 524 based upon the very facts alleged in his Complaint, but instead brought state law claims in an apparently attempt to avoid the exclusive remedies provided by the Bankruptcy Code. Such an end-run around the Bankruptcy Code is not permissible. Plaintiff's Complaint must be read to assert a violation of the discharge injunction under 11 U.S.C. § 524.

Because Plaintiff's Complaint asserts a question of federal law, this Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1457. Plaintiff's Motion to Remand should be denied.

FROST BROWN TODD LLC

By: ______________________________

Jeffrey C. Dunham (W. Va. Bar #6309)
William Harter (W.Va. Bar #7977)
707 Virginia Street East
Suite 1200, Chase Tower
Charleston, WV 25325-1387
(304) 345-0111
(304) 345-0115 (facsimile)
jdunham@fbtlaw.com
wharter@fbtlaw.com
Attorneys for Defendant HSBC Card Services Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG DIVISION

JOHN KNOTT

Plaintiff,

Case No. : 3:1-cv-82-JPB

v.

HSBC CARD SERVICES INC.

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on this **2nd** day of **September, 2010**, a copy of the foregoing ***"Defendant HSBC Card Services Inc.'s Response In Opposition To Plaintiff's Motion for Remand"*** was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Kirk H. Bottner, Esquire
The Law Office of Kirk H. Bottner, PLLC
P. O. Box 344
Charles Town, WV 25414

Jeffrey C. Dunham

CHRLibrary LR13662 . 0579069 973955v1